

FILED
ALAMEDA COUNTY

MAR 23 2023

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

MCCALL FARMS, INC.; ; DOLLAR TREE
STORES, INC. ; THE KROGER CO. ; and
DOES 1 through 100, inclusive,

Defendants.

Case No. RG 20-061569

Assigned for all purposes to the
Honorable Eumi Lee, Dept. 512

[Signature]
**[PROPOSED] CONSENT JUDGMENT AS
TO MOODY DUNBAR, INC.**

1
2 **1. INTRODUCTION**

3 1.1 The Parties to this Consent Judgment (the “Consent Judgment”) are Plaintiff Center
4 for Environmental Health (“CEH”), a California non-profit corporation, and Defendant Moody
5 Dunbar, Inc. (“Settling Defendant”). CEH and Settling Defendant (collectively, the “Parties”) enter
6 into this Consent Judgment to settle claims asserted by CEH against Settling Defendant as set forth
7 in the operative complaint (“Complaint”) in the above-captioned matter. This Consent Judgment
8 covers canned sweet potatoes, including canned yams, that are (a) manufactured, distributed, sold,
9 and/or offered for sale by Settling Defendant, and (b) sold or offered for sale in California (the
10 “Covered Products”).

11 1.2 Settling Defendant is a corporation or other business entity that employs ten or more
12 people and manufactures, distributes, sells, or offers for sale Covered Products that are sold in the
13 State of California.

14 1.3 On June 2, 2020, CEH issued a 60-day Notice of Violation pursuant to
15 Proposition 65 (Cal. Health & Safety Code § 25249.5 *et seq.*) to the California Attorney General,
16 the District Attorneys of every county in California, the City Attorneys of every California city with
17 a population greater than 750,000, and to Settling Defendant, alleging that Settling Defendant
18 violated Proposition 65 by exposing persons to lead in canned sweet potatoes, including yams,
19 without first providing a clear and reasonable Proposition 65 warning.

20 1.4 On May 19, 2020, CEH filed the Complaint in the above-captioned matter against
21 McCall Farms Inc., Dollar Tree Stores, Inc., and The Kroger Co. On August 18, 2020, CEH
22 amended the Complaint to add Moody Dunbar, Inc. as a Doe defendant in the action.

23 1.5 The Parties, in an effort to avoid protracted and costly litigation, elected to mediate
24 this case before the Hon. James L. Warren (Ret.) in JAMS’ San Francisco office. The Parties
25 attended two mediation sessions with Judge Warren, the first of which was held at JAMS’ office on
26 May 23, 2022, and the second of which was held virtually on August 31, 2022. The Parties
27 continued settlement discussions between the two mediation sessions. After hundreds of attorney
28 hours invested and the exchange of information between the Parties and Judge Warren, the Parties

1 agreed to the terms and conditions of this proposed Consent Judgment, which is a direct result of
2 the mediation process overseen by Judge Warren.

3 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
5 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County
6 of Alameda, and that this Court has jurisdiction to enter and enforce this Consent Judgment as a full
7 and final resolution of all claims which were or could have been raised in the Complaint based on
8 the facts alleged therein with respect to Covered Products manufactured, distributed or sold by
9 Settling Defendant.

10 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by the
11 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
12 Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion
13 of law, issue of law or violation of law. Nothing in this Consent Judgment prejudices, waives or
14 impairs any right, remedy, argument or defense the Parties may have in any other pending or future
15 legal proceedings. This Consent Judgment is the product of negotiation and compromise and is
16 accepted by the Parties solely for purposes of settling, compromising and resolving issues disputed
17 in this Action.

18 **2. ADDITIONAL DEFINITIONS**

19 2.1 "Compliance Date" shall mean September 1, 2023.

20 2.2 "Effective Date" shall mean the day CEH serves the Notice of Entry of this Consent
21 Judgment on Settling Defendant.

22 2.3 "Lead Level" shall mean a concentration of no more than 40 parts per billion ("ppb")
23 of lead by weight. Compliance with the Lead Level shall be determined by use of a test performed
24 by an accredited laboratory using ICP/MS (Inductively-Coupled-Plasma-Mass Spectrometry) or any
25 other testing method agreed to by the Parties. Any samples of a Covered Product tested shall be
26 homogenized before testing for lead content.

1 **3. INJUNCTIVE RELIEF**

2 **3.1 Compliance of Covered Products.** As of the Compliance Date, Settling Defendant
3 shall not manufacture Covered Products that will be sold or offered for sale in California that
4 contain lead in concentrations exceeding the Lead Level, unless Settling Defendant provides a clear
5 and reasonable warning as further specified in Section 3.2.

6 **3.2 Warning Language.** If Settling Defendant is required to provide a warning
7 pursuant to Section 3.1, the following warning language shall be deemed to comply with Settling
8 Defendant's warning obligation:



10 **WARNING:** Consuming this product can expose you to chemicals including
11 lead which are known to the State of California to cause birth defects or other
12 reproductive harm. For more information go to
 www.P65Warnings.ca.gov/food.

13 The word "**WARNING**" shall be displayed in all capital letters and bold print and shall be
14 preceded by the yellow warning triangle symbol depicted above. The warning shall be
15 securely affixed to or printed upon the label of any Covered Product, and it must be set off
16 from other surrounding information and enclosed in a box. For internet sales or catalog
17 sales by Settling Defendant, Settling Defendant shall display the warning in such a manner
18 that it is likely to be read and understood by an ordinary individual prior to the
19 authorization of or actual payment.

20 **4. ENFORCEMENT**

21 **4.1 Enforcement Procedure.** The Parties to this Consent Judgment shall have the
22 exclusive right to enforce this Consent Judgment. This Court shall have exclusive jurisdiction over
23 all matters regarding enforcement of the Consent Judgment. Prior to bringing any motion or order
24 to show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
25 provide the alleged violating party sixty (60) days advance written notice of the alleged violation as
26 set forth in Section 4.2 ("Meet and Confer Notice"), sent to the person(s) identified in Section 8 to
27 receive notice for the respective Party. The Parties shall meet and confer during such sixty (60) day
28 period in an effort to reach agreement on whether a violation occurred and/or an appropriate cure

1 for the alleged violation. After such sixty (60) day period, the Party seeking to enforce may, by
2 motion or order to show cause before the Superior Court of the County of Alameda, seek to enforce
3 the terms and conditions contained in this Consent Judgment.

4 **4.2 Enforcement of Lead Level.**

5 4.2.1 Meet and Confer Notice. After the Compliance Date, CEH may issue Settling
6 Defendant a Meet and Confer Notice, in compliance with Section 4.2.2, alleging that the Settling
7 Defendant manufactured a Covered Product in violation of Section 3.

8 4.2.2 Contents of Meet and Confer Notice for Alleged Lead level Exceedance. A
9 Meet and Confer Notice alleging that Settling Defendant manufactured a Covered Product in
10 violation of Section 3 must include, at a minimum:

- 11 (i) the date the Covered Product was purchased,
12 (ii) a copy of CEH's receipt of purchase for the Covered Product;
13 (iii) if not visible on the receipt, the name and address of the retail entity from which
14 the Covered Product was purchased, or for online purchases, the name of the website
15 from which the Covered Product was purchased and the address to which the product
16 was shipped;
17 (iv) photos of the Covered Product, including but not limited to, photos showing the
18 production date code and best-by date;
19 (v) CEH's test report on the Covered Product sample, conducted using the test
20 methodology set forth in the definition of Lead Level in Section 2.3.

21 4.2.3 Settling Defendant's Sampling. Upon receipt of a Meet and Confer Notice
22 from CEH that alleges a violation of the Lead Level, Settling Defendant shall have forty-five (45)
23 days to collect and sample a minimum of three samples of the Covered Product. Samples collected
24 by Settling Defendant must have production date codes and/or best-by date dated within sixty (60)
25 days of the corresponding production date code and/or best-by date of the sample identified in
26 CEH's Meet and Confer Notice. Settling Defendant shall provide CEH with all test data for these
27 samples, which shall be conducted using the test methodology set forth in the definition of Lead
28 Level in Section 2.3.

1 4.2.4 Assessment of Lead Levels. The determination of compliance with the Lead
2 Level will be established by averaging Settling Defendant's three or more test results and CEH's
3 single test result.

4 **5. PAYMENTS**

5 5.1 **Payments by Settling Defendant.** Settling Defendant shall pay the total sum of
6 \$105,000 as a settlement payment, as further set forth in this section, within ten (10) calendar days
7 of the Effective Date.

8 5.1.1 Allocation of Payments. The total settlement amount for Settling Defendant
9 shall be paid in separate checks in the amounts specified below and delivered as set forth below.
10 Any failure by Settling Defendant to comply with the payment terms herein shall be subject to a
11 stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each day the full
12 payment is not received after the applicable payment due date set forth in Section 5.1. The late fees
13 required under this Section shall be recoverable, together with reasonable attorneys' fees, in an
14 enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid
15 by Settling Defendant shall be allocated as set forth below between the following categories and
16 made payable as follows:

17 5.1.2 Civil Penalties. Settling Defendant shall pay \$27,725 as a civil penalty
18 pursuant to Health & Safety Code § 25249.7(b), subject to Section 5.2. The civil penalty payment
19 shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75%
20 to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")).
21 Accordingly, the OEHHA portion of the civil penalty payment for \$20,793.75 shall be made
22 payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment
23 shall be delivered as follows:

24 For United States Postal Service Delivery:

25 Attn: Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 P.O. Box 4010, MS #19B
 Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment for \$6,931.25 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.1.3 Additional Settlement Payment. Settling Defendant shall pay \$20,790 as an Additional Settlement Payment ("ASP") pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations Title 11, § 3204. CEH intends to place these funds in CEH's Toxics in Food Fund and use these funds to support CEH programs and activities that seek to educate the public about lead and other toxic chemicals in food, to work with the food industry and agriculture interests to reduce exposure to lead and other toxic chemicals in food, and to thereby reduce the public health impacts and risks of exposure to lead and other toxic chemicals in food sold in California. CEH shall obtain and maintain adequate records to document that ASPs are spent on these activities and CEH agrees to provide such documentation to the Attorney General within thirty (30) days of any request from the Attorney General. The payment pursuant to this Section shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-325198. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.1.4 Attorneys' Fees and Costs. Settling Defendant shall pay \$56,485 as a reimbursement of a portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made in two separate checks as follows: (a) \$52,500 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$3,985 payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. Both of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.2 Summary of Settlement Payments: To summarize, Settling Defendant shall deliver checks made out to the payees in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$20,793.75	OEHHA per Section 5.1.2
Center for Environmental Health	Penalty	\$6,931.25	LLG
Center for Environmental Health	ASP	\$20,790	LLG
Center for Environmental Health	Fee and Cost	\$3,985	LLG
Lexington Law Group ("LLG")	Fee and Cost	\$52,500	LLG

6. MODIFICATION AND DISPUTE RESOLUTION

6.1 **Procedure for Modification.** This Consent Judgment may be modified from time to time by (1) express written agreement of the Parties and approval by the Court or (2) by motion or application to the Court. Any modification to the Consent Judgment requires the approval of the Court and prior notice to the Attorney General's Office. As applicable, any Party seeking to modify this Consent Judgment must notify the other Party in writing, and the Parties shall thereafter attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Consent Judgment. If the Parties are unable to resolve their dispute informally within sixty (60) days after the date of the written notification, the Party that issued the written notification to seek the modification may bring a motion or proceeding to seek judicial relief as to the requested modification.

7. CLAIMS COVERED AND RELEASES

7.1 Provided that Settling Defendant complies in full with its obligations under Section 5, this Consent Judgment is a full, final and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and Settling Defendant's parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, members, employees, agents, shareholders, successors, assigns, and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant directly or indirectly distributes or sells Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees,

1 including The Kroger Co. ("Downstream Defendant Releasees"), of any violation of Proposition 65
2 based on failure to warn about alleged exposures to lead in Covered Products that were manufactured,
3 sold, distributed or offered for sale by Settling Defendant prior to the Effective Date.

4 7.2 Provided that Settling Defendant complies in full with its obligations under Section
5 5, CEH, for itself, its agents, successors and assigns, releases, waives, and forever discharges any
6 and all claims against Settling Defendant, Defendant Releasees, and Downstream Defendant
7 Releasees from any violation of Proposition 65 or any other statutory or common law claims that
8 have been or could have been asserted by CEH regarding a violation of Proposition 65 and/or the
9 failure to warn about alleged exposures to lead in Covered Products that were manufactured, sold,
10 distributed or offered for sale by Settling Defendant prior to the Effective Date.

11 7.3 Compliance with the terms of this Consent Judgment by Settling Defendant and
12 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant, the
13 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure warn
14 about alleged exposures to lead in Covered Products that were manufactured, sold, distributed or
15 offered for sale by Settling Defendant after the Effective Date.

16 8. PROVISION OF NOTICE

17 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
18 shall be sent by first class and electronic mail to:

19 Howard Hirsch
20 Lexington Law Group
21 503 Divisadero Street
22 San Francisco, CA 94117
23 hhirsch@lexlawgroup.com

24 8.2 When Settling Defendant is entitled to receive any notice under this Consent
25 Judgment, the notice shall be sent by first class and electronic mail to:

26 Peg Carew Toledo
27 Arnold & Porter Kaye Scholer LLP
28 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
peg.toledo@arnoldporter.com

8.3 Any Party may modify the person and/or address to whom the notice is to be sent by
sending the other Party notice by first class and electronic mail.

1 **9. COURT APPROVAL**

2 9.1 CEH shall prepare and file a Motion for Approval of this Consent Judgment and
3 Settling Defendant shall support approval of such Motion. This Section 9.1 shall become effective
4 upon the date this Consent Judgment signed by CEH and Settling Defendant, whichever is later.

5 9.2 If this Consent Judgment is not entered by the Court, it shall be of no further force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

8 **10. GOVERNING LAW AND CONSTRUCTION**

9 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California.

11 **11. ATTORNEYS' FEES**

12 11.1 Should CEH prevail on any motion, application for an order to show cause or other
13 proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its reasonable
14 attorneys' fees and costs incurred as a result of such motion or application. Should Settling
15 Defendant prevail on any motion application for an order to show cause or other proceeding, the
16 Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result of such
17 motion or application upon a finding by the court that CEH's prosecution of the motion or
18 application lacked substantial justification. For purposes of this Consent Judgment, the term
19 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
20 Code of Civil Procedure §§ 2016, et seq.

21 11.2 Except as otherwise provided in this Consent Judgment, each Party shall bear its own
22 attorneys' fees and costs.

23 11.3 Nothing in this Section 11 shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **12. ENTIRE AGREEMENT**

26 12.1 This Consent Judgment contains the sole and entire agreement and understanding of
27 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
28 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and

1 therein. There are no warranties, representations, or other agreements between the Parties except as
2 expressly set forth herein. No representations, oral or otherwise, express or implied, other than
3 those specifically referred to in this Consent Judgment have been made by any Party hereto. No
4 other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed
5 to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced
6 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the
7 extent that they are expressly incorporated herein. No supplementation, modification, waiver, or
8 termination of this Consent Judgment shall be binding unless executed in writing by the Party to be
9 bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or
10 shall constitute a waiver of any of the other provisions hereof whether or not related or equivalent,
11 nor shall such waiver constitute a continuing waiver.

12 **13. SUCCESSORS AND ASSIGNS**

13 13.1 This Consent Judgment shall apply to and be binding upon CEH and Settling
14 Defendant, and their respective divisions, subdivisions and subsidiaries, and the successors or assigns
15 of any of them.

16 **14. RETENTION OF JURISDICTION**

17 14.1 This Court shall retain jurisdiction of this matter to implement, modify, or enforce
18 the Consent Judgment. Notwithstanding the provisions of Section 6, nothing in this Consent
19 Judgment limits or affects the Court's authority to modify this Consent Judgment as provided by
20 law.

21 **15. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

22 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
23 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute
24 the Consent Judgment on behalf of the Party represented and legally bind that Party.

25 **16. NO EFFECT ON OTHER SETTLEMENTS**

26 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
27 against any entity other than Settling Defendant on terms that are different from those contained in
28 this Consent Judgment.

17. COMPLIANCE WITH REPORTING REQUIREMENTS

17.1 CEH agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

18. EXECUTION IN COUNTERPARTS

18.1 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: _____, 2022

CENTER FOR ENVIRONMENTAL HEALTH

Signature

Printed Name

Title

Dated: 9/13, 2022

MOODY DUNBAR, INC.

Signature

Printed Name

Title

1 **17. COMPLIANCE WITH REPORTING REQUIREMENTS**

2 17.1 CEH agrees to comply with the reporting form requirements referenced in Health
3 and Safety Code section 25249.7(f).

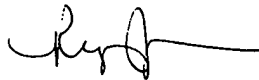
4 **18. EXECUTION IN COUNTERPARTS**

5 18.1 The stipulations to this Consent Judgment may be executed in counterparts and by
6 means of facsimile or portable document format (pdf), which taken together shall be deemed to
7 constitute one document.

8 **IT IS SO STIPULATED:**

9 Dated: September 14, 2022

CENTER FOR ENVIRONMENTAL HEALTH

11 

12 Signature

13 Regina Jackson

14 Printed Name

15 Interim CEO

16 Title

17
18 Dated: _____, 2022

MOODY DUNBAR, INC.

19
20 Signature

21
22 Printed Name

23
24 Title

1 **IT IS SO ORDERED, ADJUDGED,**
2 **AND DECREED**

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4 Dated: _____

3/22/2024

5 _____
6 Judge of the Superior Court
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